

**BOARD OF APPEALS CASE NO. 5317**

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**BEFORE THE**

**APPLICANT: Lutheran Church of the Good Shepherd**

**ZONING HEARING EXAMINER**

**REQUEST: Variance to allow parking, drive aisle  
and shed located within the required 50 foot use  
setback; 1515 – 1551 Emmorton Road, Bel Air**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 3/19/03 & 3/26/03**

**Record: 3/21/03 & 3/29/03**

**HEARING DATE: April 28, 2003 & May 21, 2003**

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## **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Lutheran Church of the Good Shepherd, is requesting a variance, pursuant to Section 267-36B, Table V, of the Harford County Code, to allow parking, drive aisle and a shed within the required fifty (50) foot use setback; a variance pursuant to Section 219-12D, to allow a permanent institutional sign in excess of 54 square feet, more than 6 feet in height and located less than one-third (1/3) of the distance of the required building setback (72 square feet proposed), 10 feet, 6 inches in height and located on the property line in an R2/Urban Residential District.

The subject property is located at 1515 and 1551 Emmorton Road, Bel Air, MD 21014 and is more particularly identified on Tax Map 49/56, Grid 4D/1D/Parcels 49/725 & 56/159. The parcels consist of 3.88 and 0.669 acres for a total of 4.549 acres. The parcels are located within the Third Election District and are presently zoned R2/Urban Residential District.

### **FACTS**

For the Applicant testified David Rudisill, who qualified as an expert engineer, site planning and design, as well as Dale Wenger, a member of the Applicant's improvement committee. A number of neighboring property owners appeared in opposition to the request. Mr. Anthony McClune appeared on behalf of the Department of Planning and Zoning. The facts of the case are largely undisputed.

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The Lutheran Church of the Good Shepherd (the Church) is located approximately 3 miles south of the Town of Bel Air on MD Rt. 924 (Emmorton Road). The parcel is located within the Development Envelope and the Church property borders Rt. 924 to the west but is surrounded on all other sides by residential properties. The Church does not have access to parking within the neighborhood. In Board of Appeals Case No. 5151, decided in 2001, the Church was granted a variance to permit extension of its parking area to within 10 feet of residential lots because of the construction of a then proposed 7,944 square-foot addition and the lack of what was described as any other area for parking. Proposed were 148 parking spaces while the Code only requires 103 spaces. Currently parking is located along Rt. 924 and the side of the existing building. The proposal will wrap parking around the property to the rear and north side. 171 parking spaces will be provided and the Code only requires that 100 be provided. Without a variance, only 138 spaces will be provided on the parcel. The Church has constructed a multi-purpose building on the parcel which has reduced the former 148 spaces by 16. Additionally, this new construction has created a dead-end turn around that requires a three point turn be executed in order to exit the property. There are also improvements underway along Rt. 924 that will eliminate the ability of church goers to utilize the Rt. 924 shoulder area for parking which has been available in the past. Unique features of the property include nearly one-third (1/3) of the parcel in buffer, a mature wooded area, and the locations of septic and septic reserve areas. Mr. Rudasill testified that the drive proposed will wrap around the rear of the church with traffic flowing in two directions. Upgrades are planned to the sediment control facility that will control run-off. There is existing green space that is proposed to remain and landscaping will be added to screen the uses on the property from residential uses. Mr. Rudasill admitted that an underground sediment control facility could be constructed but it could cost an additional estimated \$150,000. An underground facility would, however, allow parking on top of it. Additionally, if the drive were reduced to a one way configuration, a potential 18 feet of buffer encroachment would be eliminated.

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The sign proposed will be 72 square feet in size and 10-feet, six inches in height. It is proposed to be located on the property line. There is an existing sign on the parcel today but because of existing and proposed landscaping associated with this proposal, the old sign will not be visible. The proposed sign size, height and location will make the sign more visible to passersby along Rt. 924 according to the Applicant's witnesses. The proposed sign is depicted on Attachment 10 to the Department of Planning and Zoning Staff Report.

There was also testimony that a shed had been located within the use setback for some time. It was discovered during investigation of this case that its location was not permitted and was not approved pursuant to the variance granted in Board of Appeals Case No. 5151 described above. The shed has since been relocated but a request to relocate the shed to its former location will free up 3 additional parking spaces.

There were concerns voiced that the motorists trying to enter the property are creating a problem for neighbors that live across Rt. 924 from the Church entrance. At peak usage times on the Church property, Dr. and Mrs. Hart, who reside at 1548 Emmorton Road, find it impossible to make a left turn onto Rt. 924. If the proposal is approved, traffic will increase on the property and along Rt. 924 making an already difficult traffic situation even worse according to Mrs. Hart.

Mr. John Scotten lives at 1553 Emmorton Road, directly adjacent to the Church property. Mr. Scotten testified that the current sign is in keeping with the neighborhood and the Church use and is clearly visible from the roadway. In his opinion there appears to be adequate parking for Sunday parishioners. He is concerned that the proposal will further eliminate existing green space and a playground area. Of particular concern to Mr. Scotten is the proposal to build up berms along the property line and then plant trees on top of that. This landscaping will obliterate his view and place his property in a "cave-like" situation with large trees looming overhead. This will create perpetual shade and wet areas in his rear yard and increases the likelihood of damaging storm water runoff to his property. He also expressed concern that earlier testimony provided by experts for the Church in previous Board of Appeals cases were able to justify their former requests by stating that what is proposed today was not feasible or possible from an engineering standpoint.

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Mr. Gary Clark, who resides at 1516 Balmoral Drive, directly adjacent to the Church property described increasingly difficult erosion problems to this property caused, in his opinion, by run off from the church parcel. He produced photographs that clearly indicate severe erosion being created by runoff emanating from the direction of the Church property. Some of the cuts in his property are as deep as 4 feet and ponding is a regular occurrence. He is very concerned that any additional impervious surface added to the Church property will exacerbate an already unacceptable problem on his land. The proposal will bring the sediment control facility even closer to his property and further, the proposed berming and tree planting will result in a situation where, when standing in his backyard, he will be looking straight up at a 30 foot wall of trees and dirt. Mr. Clark stated that all of these issues have been created by the Church itself. By eliminating parking along Rt. 924 because of placement of a building, they now want to move the sign. Additionally, it is the construction of the multi-purpose building that now creates the need for additional variances regarding the shed, the driveway and the parking locations.

Mr. John Edler lives next door to Mr. Clark and he is similarly concerned about erosion if more impervious surface is added to this property. He also believed that lights proposed as part of the landscaping may intrude on his privacy and interfere with his use and enjoyment.

The Department of Planning and Zoning has recommended approval of the proposal upon several conditions including obtaining all permits and inspection, combining for recordation the two parcels, submittal of a final landscaping plan and general conformance of the sign with that depicted on Attachment 10. The Department found the parcel unique based on size, shape and topography as well as the location of the existing improvements.

**CONCLUSION AND RECOMMENDATION**

The Applicant, Lutheran Church of the Good Shepherd, is requesting a variance pursuant to Section 267-36B, Table V, of the Harford County Code, to allow parking, drive aisle and a shed within the required fifty (50) foot use setback; a variance pursuant to Section 219-12D, to allow a permanent institutional sign in excess of 54 square feet, more than 6 feet in height and located less than 1/3 of the distance of the required building setback (72 square feet proposed) , 10-feet, 6 inches in height and located on the property line in an R2/Urban Residential District.

The applicable Harford County Code sections follow:

**Section 267-11 Variances.**

- A. Except as provided in Section 267-41.1.H, variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:**
  - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.**
  - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.**
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.**
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.**

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### **Section 267-12D Signs permitted in all zoning districts.**

The following signs shall be permitted anywhere within the county:...

- D. Permanent institutional signs. Signs of a permanent nature setting forth the name of places of worship, service clubs, civic organizations, public or service centers, public institutions, schools or other similar uses shall be permitted if the setback is 1/3 of the required building setback of the district. Illumination shall be in accordance with the restrictions set forth in § 219-11. Such signs shall not exceed 54 square feet for the overall structure and shall not exceed six feet in overall height.

### **Section 219-17 Variances.**

The Board may grant a variance from the provisions of this chapter if, by reason of the configuration or irregular shape of the lot or by reason of topographic conditions or other exceptional circumstances unique to the lot or building, practical difficulty or unnecessary hardship results. The Board shall, before granting the variance, make a written finding as part of the record that the conditions or circumstances described are unique to the lot or building, that the conditions or circumstances cause the difficulty or hardship and that the variance can be granted without impairment of the purpose and provisions of this chapter.

The Maryland Court of Special Appeals has provided guidance in matters of variance requests and described a two step analysis in determining whether such requests should be granted. According to the guidance provided by the Court, the variance process is a two-step sequential process:

1. The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is, in and of itself, unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness or peculiarity of the property causes the zoning provision to impact disproportionately upon the property. If this finding cannot be made, the process stops and the variance must be denied. If, however, the first step results in a supportive finding of uniqueness or unusualness, then the second step in the process is taken.
2. The second step is a demonstration whether unreasonable hardship (or practical difficulty) results from the disproportionate impact of the ordinance caused by the property's uniqueness exists." Cromwell v. Ward, 102 Md. App. 691 (1995).

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The Maryland Court of Special Appeals has determined how “uniqueness” is determined in a zoning context and found that:

“In the zoning context, the unique aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. Uniqueness of a property for zoning purposes requires that the subject property have some inherent characteristic not shared by other properties in the area, i.e. its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls”. North v. St. Mary’s County, 99 Md. App. 502, 638 A.2d 1175 (1994).

In the opinion of the Hearing Examiner, the Applicant has failed to meet the burden of proof imposed by the Maryland Courts regarding establishing the uniqueness of the parcel justifying the grant of the variance. The Cromwell court recited the longstanding principal of zoning law that, “Self-inflicted or self-created hardship is never considered proper grounds for a variance. Where an Applicant creates a non-conformity, the board lacks the power to grant a variance.” The need for the requested variances in this case arises from the Applicant’s decision to construct yet another addition to the Church uses. That construction eliminated parking spaces that already had existed and were permitted by grant of an earlier approved variance. Similarly, the construction of the multi-purpose building created a dead-end situation that now requires a three point turn in order for cars to exit the parking area on that side of the Church. Additionally, the need for a sign variance is not necessitated because of road or other topographic conditions but rather, the elimination of parking and open area located on the Rt. 924 side of the parcel by construction of the new multi-purpose building. There were no unique topographical features that created the need for this variance.

While the Department of Planning and Zoning determined the property was unique, its reasons for that finding do not withstand scrutiny. First, the Department states uniqueness is based on the size of the lot. While it is true that a larger lot with the existing improvements may not need variances it is not, however, the size of the lot that creates the need for the variance but the fact that the Applicant has filled the parcel with structures and limited any further available space for impervious surface on the parcel.

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The structures on the property are not unique in that there are numerous similar churches throughout Harford County. Nor is the shape of the lot unique compared to other lots of similar size in the zone. Lastly the Department cites the location of improvements on the property as a reason for uniqueness yet, the Maryland Courts have consistently rejected the notion that the placement of structures on the parcel constitutes uniqueness. There was no testimony offered that unique or unusual characteristics of the property necessitated the proposed size, height and location of new signage. This request is in the nature of one that would be convenient for the Applicant but not necessary or warranted under the provisions of the Harford County Code or the circumstances of this case. The photos included with the file of the existing Church facility show an aesthetically appealing sign that is quite visible to passersby. It apparently has existed for quite some time without any issues regarding its size, height or location.

Without the grant of the variances requested, the Church still maintains more parking spaces than required by Code. Testimony of the Applicant's witnesses indicated that alternative configurations could reduce or eliminate the need for the variances requested. For example, the drive could be configured as one way; existing green space could be used for parking; a sediment control facility could be constructed underground to allow parking above. In other words, there are alternatives to the current proposal that could reduce or eliminate the need for any of the requested variances.

The Hearing Examiner also points out that this is not an unsophisticated and unknowledgeable Applicant. This is an Applicant that has sought variances in the past related to parking areas and is well aware of the restrictions imposed by the Harford County Code. Generally, an Applicant that has knowledge of zoning restrictions and constructs a building or other structure necessitating a variance or in violation of existing zoning requirements has self-created his/her dilemma and is not generally entitled to relief on the basis of hardship. Ad + Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md.307, 513 A.2d 893 (1986); Wilson v. Mayor & Comm'rs of Town of Elkton, 35 Md. App. 417, 371 A.2d 443 (1977); Richard Roesser Professional Builder, Inc. v. Anne Arundel County, 368 MD 294, 793 A.2d 545 (2002).



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The legal principal regarding self-created hardship was further articulated by the Wilson, supra, court when it stated, "...if the unusual circumstances which hinder reasonable use of the property in accord with zoning ordinance restrictions have been caused or created by the property owner or his predecessor in title, hardship cannot be demonstrated since it is essentially self-created and not due *solely* to the manner of the operation of the ordinance upon the subject property."

Although the Hearing Examiner finds that the Applicant has failed to establish uniqueness that necessitates a variance and, further, that the hardship, if any, results from the Applicant's own actions in constructing the multi-purpose building, not to be ignored are significant issues raised by the protesting parties that appeared regarding the impacts associated with the proposed variances. There was significant indication that severe erosion has taken place on neighboring properties as a result of increased impervious surface and inadequate sediment controls on the subject property. Further increasing the impervious surface area and creating elevated earthen dams can only further exacerbate the erosion that is impacting some of the neighboring properties. There will clearly be an unwanted visual impact created by elevated earthen berms with tall trees hovering above neighboring properties. Already wet yards will be shrouded in even denser shade and this is likely to further contribute to the existing runoff and erosion problems on these adjacent properties.

The Applicant has cited the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.A 2000 cc et seq. in support of the proposition that Harford County cannot deny the Applicant's request because the Harford County Zoning Ordinance "imposes a substantial burden on the religious institution without demonstration that such action satisfies a compelling government interest and the least restrictive means in furthering that interest. The Hearing Examiner finds the argument specious. The Federal District Court for the District of Wyoming has had an opportunity to examine the relationship of a zoning ordinance to the provisions of RLUIPA and found that a zoning ordinance restricting the ability of the church to operate a day care center did not interfere with the practice of religious belief, the sincere belief itself or in any other way violate the provisions of RLUIPA.

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The Court stated that the zoning ordinance was enforceable as to the Church and that mere inconvenience to the religious institution was insufficient to allow the church to garner the protection of the statute and avoid the zoning ordinance. Grace United Methodist Church v. City of Cheyenne, 235 F.Supp. 2d 1186 (D. Wyo. 2002); see also C.L.U.B. v. City of Chicago, 157 F.Supp. 2d 903 (N.D. Ill. 2001). The Harford County Code does not restrict the Applicant herein from its beliefs or its practice of religion. Indeed, the Church is operating and is growing at a rate of 3.5% per year without the need for a variance. While a denial may be inconvenient for the Applicant, that denial, in the opinion of the Hearing Examiner, does not invoke the protections of the statute cited as authority by the Applicant.

The Hearing Examiner, for the reasons stated herein, recommends that the Applicant's requests be denied.

Date    AUGUST 13, 2003

William F. Casey  
Zoning Hearing Examiner